

## New Jersey Court of Errors and Appeals

*Between*

ARTHUR BRISBANE,  
*Complainant-Respondent,*

*and*

JAMES A. SULLIVAN, *et als.*,  
*Defendants-Appellants.*

*On Appeal.*

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### **Petition for Re-Submission.** *Darius*

*To the Honorable, the Judges of the  
Court of Errors and Appeals:*

Your petitioner, Arthur Brisbane, respectfully shows that he is the complainant below and the respondent on appeal in the above entitled cause:

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That on February 7, 1916, a decree was made in the Court of Chancery of New Jersey against the defendants below, the appellants in the above entitled cause, which decree provided that said defendants below, within thirty days from the date of service of a certified copy of said decree upon the solicitor of said defendants below, convey by a good and sufficient deed unto the said complainant below all of their respective right, title and interest in and to the premises described in said decree, and that the said complainant below tender to said defendants below, upon the execution and delivery of said deed, the sum of \$141.85 (said sum being the balance reported by the special master in his report of May 1st, 1915, with which the complainant below was chargeable) less the sum of \$101.97 (said last mentioned sum being the balance due to

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the complainant below from the period from May 1st, 1915, the date of said Master's report, to the date of this decree, being in effect an extension of said Master's report along the same lines and in the same manner as said Master's report was figured down to the date of this decree) which equals the sum of \$39.88, said sum being the amount with which said complainant  
10 below was chargeable at the date of said decree.

The said decree then goes on to provide for the tender to said defendants below by the complainant below of the above-mentioned deed and that in the event of said defendants below refusing or failing to execute and deliver said deed, that the title to the premises mentioned in said decree should vest in the complainant below. Said decree further provided that Jacob L. Newman, Esquire, one of the Masters of the Court  
20 of Chancery, should supervise the passing of the title and the amount found to be due, providing also that said Master should figure the amount due to the date of the execution and delivery of said deed or the last day when said deed should be delivered according to the terms of said decree.

The said decree further provided that upon the making or tender of the said payment and the delivery of the said deed the contract (which  
30 was the basis of suit) should be held and considered to have been in all respects fully performed, with the like effect as though the said James A. Sullivan had conveyed said premises in accordance with the terms of said contract.

The decree further provided that either party should have liberty to apply to the Court of Chancery for further directions or relief in the premises, as occasion should require.

The decree concluded with a provision for payment by defendants below to complainant below of his costs of suit.

Thereupon defendants below took an appeal to this court, to review the said decree. Said appeal was submitted to this court on briefs on July 10, 1916, and on November 20, 1916, under an opinion of this court filed with the clerk thereof, the bill of complaint was dismissed and the decree of the Court of Chancery reversed. 10

Upon a consideration of the opinion so filed, your petitioner respectfully prays that this court will grant a re-submission of briefs before it on the following points:

1. That the Court of Chancery erred in decreeing that the defendants below convey unto the complainant below all their respective right, title and interest in and to the premises described in the said decree, with an abatement of the purchase price, inasmuch as the evidence showed that defendants (below) were seized of only a life estate for the life of Dora Kasthuber. Indeed, it is admitted by the appellants in many places in their points filed in this court, that they did not have a marketable title and, therefore, could not convey the same to the respondent. 20

On pages 5 and 6 of appellants' points, in speaking of the certificate or report of title of the Title Company who examined the title to the property in question, which reports are marked Exhibits D-25 and D-24 in state of the case, (there seems to be some confusion in the marking of these exhibits) appellants say: 30

"Then the certificate proceeds to give a partial memorandum of possible defects in the Sullivan title. This partial memorandum consists of four typewritten pages. It shows 40

conclusively that no title was ever made against the infant remaindermen by the tax proceedings. That no notice was ever given to them and that in fact the whole proceedings were a nullity."

Further along, on p. 7, in their points, appellants say, after quoting various recitals from the above-mentioned certificate:

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"From the above recitals taken from the certificate of the Title Company, it is apparent that the title of the defendant is very uncertain and doubtful."

And on page 8, as follows:

"By all the evidence of the case the title of Sullivan is in the utmost confusion."

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And on page 10, in quoting from a letter from Mr. Fielder, attorney for Sullivan, to Mr. Cowart, as follows:

"Reading over again your criticisms of the tax sale proceedings, I am of the opinion that they are well founded and that the title supposed to be passed through these proceedings is bad."

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And on the same page, in quoting from another letter of Fielder to Cowart, where he refers to a demand of Cowart that Sullivan give a deed in accordance with his contract, as follows:

"It seems to me that your client is apparently urging you to force Mr. Sullivan to do something he is absolutely unable to do."

And on page 18, as follows:

"As pointed out above, the character of the title of the defendant is very doubtful. There is no question that it is unmarketable. \* \* \*"

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Of course, the testimony of the complainant (below) shows conclusively that both the defendants' (below) title to the property in question is defective. However, as we have shown that this is not only not controverted by the appellants, but is actually admitted by them in many places, it is not necessary to go into the complainant's (below) evidence on this point. 10

The Vice Chancellor who heard the case below determined from the evidence that all of the title which the defendants (below) had acquired was the life estate of one Dora Kastenhuber. That there was evidence on which this finding could be based will be seen from the fact that the deeds in the chain of title of the appellants, together with the certificate report and schedule of the Title Company who examined the title, were offered in evidence, as well as the will of Thomas H. N. Wilks, a former owner of the lands in question. From an examination of these exhibits the following was deduced by the Vice Chancellor: 20

That Thomas H. N. Wilks died on July 8, 1889, leaving a will in and by which he devised the property in question to Dora E. Wilks, for the term of her natural life, and at her death to the heirs of her body born in lawful wedlock, with a devise over in case of failure of issue. Dora E. Wilks subsequently married William P. Kastenhuber; she has become the mother of two children, born in lawful wedlock, both of whom are infants under the age of 21 years. Mr. and Mrs. Kastenhuber and the two children are living. Mrs. Kastenhuber, the life tenant, allowed the taxes assessed by the City of Jersey City against the said premises to remain unpaid. Thereupon they were sold and by direction of the Circuit Court of Hudson County a deed therefor was delivered to Charles R. Dieffenbach, the pur- 30 40

chaser at the tax sale. He subsequently conveyed the same to William P. Kastenhuber, the husband of the life tenant, and they joined in a conveyance to James Billington, who, in turn, conveyed the same to the defendant, Ella J. Sullivan. Miss Sullivan took title, not for herself, but for her brother, the defendant, James  
 10 A. Sullivan, who advanced the purchase money. James A. Sullivan thereupon made the contract in question on July 19, 1910.

It subsequently developed, upon a search of the title of the premises, that the tax sale was defective in many particulars, as was shown by the report of the Title Company above mentioned. It will be seen that Dora Kastenhuber, formerly Dora E. Wilks, obtained a life estate by virtue of the will. If the tax sale had been valid she  
 20 would have received, by mesne conveyances, a fee in which the life estate would have merged. As the court found that the tax sale was invalid, it left her with merely a life estate, which was all that the defendants (below), through mesne conveyance, obtained. As a matter of fact, appellants do not seriously contend that they did not receive such life estate, merely stating in effect that this title is in such confusion that it is not certain that they did receive such life  
 30 estate. As pointed out above, however, the appellants do admit, in numerous places, that the title is unmarketable. There was undoubtedly sufficient evidence before the court below to warrant it in finding that a life estate was what the defendants (below) obtained in this property. This being so the court below should have decreed that defendants convey to complainant (below) the life estate which said defendants had in the property in question, with an abatement of the purchase price by reason of their inability to convey a fee as called for in the con-  
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tract which is the basis of these proceedings. Therefore, it is within the undoubted power of this court to amend the decree of the Court of Chancery so that it will effectuate this result.

2. As the question of whether the defendants (below) can be decreed to specifically convey a life estate to the respondent, with an abatement of the contract price, was not considered by this court in its opinion, and as this will become an issue in the cause when the decree is modified as above set forth, we respectfully urge that a re-submission of this case be allowed and that the parties hereto be permitted to submit further briefs or points on the questions herein set forth. 10

Respectfully submitted,

RIKER & RIKER,  
*Attorneys for Petitioner.*

EDGAR H. PINNEO, 20  
*Of Counsel with Petitioner.*

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